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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|------------------------|------------------|
| 09/976,423 | 10/12/2001 | Kirk Hogan | HOGAN-06650 | 2436 |
| 23535 | 7590 | 10/16/2003 | EXAMINER | |
| MEDLEN & CARROLL, LLP 101 HOWARD STREET SUITE 350 SAN FRANCISCO, CA 94105 | | | GOLDBERG, JEANINE ANNE | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 1634 | |

DATE MAILED: 10/16/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/976,423

Applicant(s)

HOGAN, KIRK

Examiner

Jeanine A Goldberg

Art Unit

1634

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 08 September 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

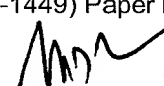
NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☒ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: NONE.Claim(s) objected to: NONE.Claim(s) rejected: 45-68 and 71.Claim(s) withdrawn from consideration: 69 and 70.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____


JEFFREY FREDMAN
PRIMARY EXAMINER



Continuation of 5. does NOT place the application in condition for allowance because:

All of the arguments are directed to the newly amended claims. To the extent that the claims have not been entered, the arguments are moot. The response argues that the claims are not anticipated. The response asserts the examiner's arguments are conclusory and unsupported by case law or the MPEP. The rejection of record cites both the MPEP and case law on number occasions (see pages 9-11, for example). The response asserts that the intended use which is recited on the instructions with printed instructions for use. This argument has been thoroughly addressed in the final rejection. The third reason the response traverses is that the instructions both chemically and physically affect the chemical nature of the components of the kit. The final rejection also has thoroughly responded to this arguments. Fourth, the response again asserts there is no case law or MPEP citation which is relevant such that the examiner has made up and does not comport with the law. Applicant is respectfully requested to read In re Gulack.

With respect to the declaration filed under 1.132, the MPEP states, 716.01 Generally Applicable Criteria The following criteria are applicable to all evidence traversing rejections submitted by applicants, including affidavits or declarations submitted under 37 CFR 1.132:(A) Timeliness . Evidence traversing rejections must be timely or seasonably filed to be entered and entitled to consideration. In re Rothermel, 276 F.2d 393, 125 USPQ 328 (CCPA 1960). Affidavits and declarations submitted under 37CFR 1.132 and other evidence traversing rejections are considered timely if submitted:

- (1) prior to a final rejection,
- (2) before appeal in an application not having a final rejection, or
- (3) after final rejection and submitted
 - (i) with a first reply after final rejection for the purpose of overcoming a new ground of rejection or requirement made in the final rejection, or
 - (ii) with a satisfactory showing under 37 CFR 1.116(b) or 37 CFR 1.195, or
 - (iii) under 37 CFR 1.129(a).

The declaration has been filed after a final rejection and does not address a new ground of rejection. Further there is no satisfactory showing under 1.116(b) or 1.195, therefore, the declaration has not been considered.

Def brief if
filed.